



## **OFFICE OF PERSONNEL MANAGEMENT**

### **5 CFR Part 120**

**RIN: 3206-AO01**

### **Guidance Procedures**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** This rule codifies the Office of Personnel Management’s policies and procedures for reviewing and clearing administrative guidance documents.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Alexys Stanley by telephone at (202) 606-1000 or by e-mail at [regulatory.information@opm.gov](mailto:regulatory.information@opm.gov).

**SUPPLEMENTARY INFORMATION:** This final rule, which adds part 120 to Title 5 of the Code of Federal Regulations, is adopted pursuant to Executive Order 13891, titled: “Promoting the Rule of Law Through Improved Agency Guidance Documents” (84 FR 55235, October 9, 2019). The Executive order requires Federal agencies to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.

This final rule also incorporates the requirements of Office of Management and Budget Memorandum M-20-02 of October 31, 2019, which implements the Executive order.

### **Waiver of Notice of Proposed Rule Making**

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of “agency organization, procedure, or practice.” *See* 5 U.S.C. 553(b)(A). The Civil Service Reform Act’s additional provisions for rulemaking by

OPM incorporate this exception. *See* 5 U.S.C. 1105. Since this is not a substantive rule but a rule of agency procedure, notice and comment are not necessary.

#### **Executive Order 12866**

This rule is not a significant regulatory action under E.O. 12866.

#### **Executive Order 13771**

This rule is not subject to the requirements of E.O. 13771 because this rule is not a significant regulatory action under E.O. 12866 and imposes only *de minimis* costs.

#### **Regulatory Flexibility Act**

This regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

#### **Federalism**

OPM has examined this rule in accordance with Executive Order 13132, Federalism, and has determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

#### **Civil Justice Reform**

This regulation meets the applicable standard set forth in Executive Order 12988.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Paperwork Reduction Act Requirements**

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

**List of Subjects in 5 CFR Part 120**

Administrative practice and procedure.

Office of Personnel Management.

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Alexys Stanley,

Regulatory Affairs Analyst.

For the reasons stated in the preamble, OPM amends title 5 of the Code of Federal Regulations by adding part 120 as follows:

1. Add part 120 to read as follows:

**PART 120 —ADMINISTRATIVE GUIDANCE**

**Sec.**

- 120.1 Purpose and scope.
- 120.2 Definitions applicable to this part.
- 120.3 Requirements for clearance.
- 120.4 Public access to guidance documents.
- 120.5 Definition of significant guidance document.
- 120.6 Procedure for guidance documents identified as “significant”.
- 120.7 Notice-and-comment procedures.
- 120.8 Petitions to withdraw or modify guidance.
- 120.9 Rescinded guidance.
- 120.10 Exceptional circumstances.

120.11 Reports to Congress and GAO.  
12012 No judicial review or enforceable rights.

Authority: 5 U.S.C. 552(a)(1); E.O. 13891, 84 FR 55235.

**§ 120.1 Purpose and scope.**

- (a) This part prescribes general procedures that apply to OPM guidance documents.
- (b) This part governs all OPM employees and contractors involved with all phases of issuing guidance documents.
- (c) This part applies to all OPM guidance documents in effect on or after April 28, 2020.

**§ 120.2 Definitions applicable to this part.**

(a) Except as provided in paragraph (b) of this section, the term *guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(b) The term *guidance document* does not include:

- (1) Rules promulgated under 5 U.S.C. 553 (or similar statutory provisions);
- (2) Rules of agency organization, procedure, or practice that are not anticipated to have substantial future effect on the behavior of regulated parties or the public;
- (3) Decisions of agency adjudications;
- (4) Internal executive branch legal advice or legal opinions addressed to executive branch officials;
- (5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.*, case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.*, guidance pertaining to the use, operation, or control of a Government facility or

property), and correspondence with individual persons or entities (*e.g.*, congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(6) Legal briefs, other filings with a court or administrative tribunal, records or communications produced in a legal proceeding, or positions taken in litigation or enforcement actions;

(7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth a new regulatory policy;

(8) Guidance pertaining to military or foreign affairs functions, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services), and any other guidance when application of this order, or any part of this order, would, in the judgment of the Director of OPM, undermine the national security;

(9) Any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(10) Any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(11) Grant solicitations and awards;

(12) Contract solicitations and awards;

(13) Agency documents that are not publicly disseminated, including classified information, information subject to a statutory or regulatory redisclosure restriction, privileged information, and information exempt from disclosure under the Freedom of Information Act;

(14) Purely internal agency policies or guidance directed solely to OPM employees or contractors that are not anticipated to have substantial future effect on the behavior of regulated parties or the public; and

(15) Documents that are directed solely to other agencies (or personnel of such agencies) and that are not anticipated to have substantial future effect on the behavior of regulated parties or the public, including the typical documents issued for government-wide use by OPM.

(c) *OMB* means the Office of Management and Budget.

(d) *OIRA* means the Office of Information and Regulatory Affairs of OMB.

### **§ 120.3 Requirements for clearance.**

Except as described in § 120.6(c), the Director of OPM may delegate any function related to the review and clearance of guidance. OPM's review and clearance of guidance shall ensure that each guidance document proposed to be issued by OPM satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for agency action);

(b) The guidance document identifies or includes:

(1) The term "guidance" or its functional equivalent;

(2) The issuing office name;

(3) A unique identifier, including, at a minimum, the date of issuance, title of the document, and its regulatory identification number (Z-RIN) in the case of a significant guidance document;

(4) The general topic, activity, persons, and/or entities to which the guidance applies;

(5) Citations to applicable statutes and regulations;

(6) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(7) A concise summary of the guidance document's content;

(c) The guidance document avoids using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless it is binding guidance by law or as incorporated in a contract, the language is describing an established statutory or regulatory requirement, or the language is addressed to agency staff or other Federal employees and will not foreclose OPM’s ability to consider positions advanced by any affected private parties;

(d) The guidance document is written in plain and understandable English; and

(e) The guidance document includes the following disclaimer prominently: “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.” When a guidance document is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, the originating office should modify this disclaimer to reflect either of those facts.

#### **§ 120.4 Public access to guidance documents.**

(a) OPM shall ensure all guidance documents in effect are on OPM's Web portal in a single, searchable, indexed database, available to the public.

(b) The Web portal will:

(1) Include an index with each guidance document's name, date of issuance, date of posting, and unique agency identifier; if the guidance document is a significant guidance document, its Z-RIN; the general topic and a brief (1-2 sentence) summary of the guidance document; and a hypertext link to the guidance document;

(2) Note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(3) Note that OPM may not cite, use, or rely on any guidance that is not posted except to establish historical facts unless OMB makes an exception for particular guidance documents or categories of guidance documents;

(4) Include a link to this part and to any Federal Register notice referencing the Web portal;

(5) Explain how the public can request the withdrawal or modification of an existing guidance document, including an email address where electronic requests can be submitted, a mailing address where hard copy requests can be submitted, and an office at the agency responsible for coordinating such requests; and

(6) Include the information about proposed significant guidance documents described in § 120.7.

#### **§ 120.5 Definition of significant guidance document.**

(a) The term significant guidance document means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:



(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

(b) The term significant guidance document does not include the categories of documents excluded by § 120.2 or any other category of guidance documents exempted in writing by OPM in consultation with OIRA.

#### **§ 120.6 Procedure for guidance documents identified as “significant.”**

(a) OPM will make an initial, preliminary determination about a guidance document's significance. Thereafter, OPM must submit the guidance document to OIRA for its determination whether guidance is significant guidance, unless the guidance is otherwise exempted from such a determination by the Administrator of OIRA.

(b) Significant guidance documents, as determined by the Administrator of OIRA, must be reviewed by OIRA under E.O. 12866 before issuance; and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(c) Significant guidance documents must be signed by the Director of OPM.

### **§ 120.7 Notice-and-comment procedures.**

(a) Except as provided in paragraph (b) of this section, all proposed OPM guidance documents determined to be a “significant guidance document” within the meaning of § 120.5 shall be subject to the following informal notice-and-comment procedures. OPM shall publish notification in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available, shall post a link to the Federal Register notice and the draft guidance document on its guidance portal, shall invite public comment on the draft document for a minimum of 30 days, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance Web portal, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OPM finds good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefore in the guidance issued).

(c) Where appropriate, the originating office may recommend to the Director of OPM that a particular guidance document that is otherwise of importance to OPM's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

### **§ 120.8 Petitions to withdraw or modify guidance.**

(a) Any person may petition OPM to withdraw or modify a particular guidance document as specified by § 120.4(b)(5).

(b) Any person may submit a petition to OPM requesting withdrawal or modification of any effective guidance document by writing to OPM Office of the Executive Secretariat at: OPMExecSec@opm.gov, or U.S. Office of Personnel Management Attn: Executive Secretariat 1900 E Street, NW, Washington, DC 20415.

(c) OPM will respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

#### **§ 120.9 Rescinded guidance.**

(a) In the absence of a petition, OPM may rescind a guidance document on grounds that it is no longer accurate or necessary.

(b) If OPM rescinds a guidance document, the hyperlink to the guidance document will be removed. The name, title, unique identifier, and date of rescission will be listed on the guidance portal for at least one year after rescission.

(c) No employee of OPM may cite, use, or rely on rescinded guidance documents, except to establish historical facts, unless OMB makes an exception for particular guidance documents or categories of guidance documents.

#### **§ 120.10 Exceptional circumstances.**

(a) A guidance document may be exempted from the requirements of section 120.6(b) or 120.7(a) by agreement of OPM and OIRA for reasons of exigency, safety, health, or other compelling cause.

(b) In emergency situations or when OPM is required by statutory deadline or court order to act more quickly than normal review procedures allow, OPM will notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this part at the

earliest opportunity. Wherever practicable, OPM should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this part.

**§ 120.11 Reports to Congress and GAO.**

When OPM adopts final guidance constituting a “rule” under 5 U.S.C. 804, OPM will submit the reports to Congress and GAO and comply with the procedures specified by 5 U.S.C. 801 (commonly known as the Congressional Review Act).

**§ 120.12 No judicial review or enforceable rights.**

This part is intended to improve the internal management of OPM. As such, it is for the use of OPM personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

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